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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-702

FRANK JAMES TOCCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-5916

CHARLES RICHMOND, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-5924

NORRIS LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-5925

RALPH LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. in No. 71-702, A1-A25) is reported at 449 F. 2d 288.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1971. Petitions for rehearing *en banc* were denied on October 28, 1971. Tocco's petition for a writ of certiorari (No. 71-702) was filed on November 26, 1971. As to the other petitioners,[1] Mr. Justice Blackmun extended the time for filing the petitions for writs of certiorari to and including December 27, 1971. On December 23 and 27, 1971, the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

All petitioners:

1. Whether petitioners were improperly denied access to accomplice Neal.

2. Whether petitioners were deprived of their Sixth Amendment right to compulsory process for a witness.

3. Whether a remote family relationship between one of the jurors and petitioner Richmond, of which the juror was unaware during the trial, denied petitioners a trial before an impartial jury.

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[1] The petition of Richmond was filed on December 23, 1971; Smith and Long filed petitions on December 27, 1971.

4. Whether a search warrant, under which items were seized from a trash barrel and admitted into evidence, was properly issued and executed.

Petitioner Richmond:

5. Whether the trial court erred in refusing to make available the complete grand-jury testimony of an individual who did not testify at the trial.

6. Whether petitioner was deprived of his rights under the Sixth Amendment where an in-court identification was based on pretrial photographic identification conducted after his arrest without the presence of counsel.

Petitioner Long:

7. Whether petitioner's arrest without a warrant was based on probable cause.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on two counts of an indictment charging them, together with one Willie Neal,[2] with bank robbery (Count I), in violation of 18 U.S.C. 2113(a) and (d), and conspiracy to rob the bank (Count II). Petitioners were each sentenced to twenty years' imprisonment on count one and to a concurrent five-year term on count two. The court of appeals affirmed in a comprehensive opinion (Pet. in No. 71-702, A1-A25).

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[2] Neal had entered a guilty plea prior to trial.

At approximately 8:10 A.M. on May 22, 1970, three armed men robbed the Jefferson Bank and Trust Company in St. Louis, Missouri of $27,710.00 (Tr. 157, 164). While one of the robbers disarmed the bank guard and put a gun to his head (Tr. 368), the other two accosted two bank tellers and seized money from them at gunpoint (Tr. 391, 401). During the robbery one to three shots were fired, but no one was injured (Tr. 347, 368, 390, 401). While the tellers were being robbed, a messenger from Brink's, Inc. entered the bank carrying a bag containing $71,675.08, most of which was in checks, for deposit (Tr. 417-420, 438). One of the robbers placed his gun against the messenger's head and took the bag (Tr. 419-420). All three men then fled the bank and disappeared.

Accomplice Neal was called as a government witness and testified substantially as follows: he, Long, Richmond and Smith met at Tocco's place of business from 5:30 to 6:30 P.M. on May 20, 1970, where Tocco outlined the plan for the holdup (Tr. 203-205). Tocco then took all of them in his station wagon to view the bank (Tr. 205-206). They met again the following day at about 5:30 P.M. at Tocco's place of business, and drove to the bank again for the purpose of further observation (Tr. 198-200). On May 22, 1970, at approximately 7:45 A.M. Neal met Smith and Tocco behind Tocco's business establishment (Tr. 206-207). Smith and Neal were picked up by Long and Richmond in a stolen car, and the four of them drove to the bank (Tr. 208-209). Tocco met them near the bank in his station wagon (Tr. 209). Neal,

Smith and Richmond entered the bank through the rear door (Tr. 210). Smith held the bank guard at gunpoint while Neal and Richmond went to the tellers' windows (Tr. 211-212). After the three men left the bank, Long drove the stolen car a few blocks. After they stopped, they were picked up by Tocco (Tr. 213-215), who then dropped them off. Tocco retained the money, guns and gloves used in the robbery (Tr. 216). At about 6:00 P.M. Neal met Long, Tocco, Tocco's brother Pete, and Richmond at Tocco's place of business (Tr. 217, 279-280). Tocco said there was $18,000 on the desk and each would receive $3,000 (Tr. 219). Tocco also said that there was another $80,000 to $90,000 in checks, which he would burn together with the Brink's bag (Tr. 220-221).

ARGUMENT

1. Before trial, on July 31, 1970, counsel for the various petitioners stated that they wished to interview Neal who had been sentenced for study and evaluation under the Youth Corrections Act, 18 U.S.C. 5010(b) (Tr. 109-110). The court said that they should consult Neal's attorney and that, if Neal was going to be used as a witness, the defense would be given an opportunity to interview him in the presence of his attorney (Tr. 111). The motion was renewed on August 10, 1970, and the court pointed out that petitioners should have contacted Neal's attorney (Tr. 125-126). The United States Attorney reported that Neal's attorney had called him to inquire about the status of the motions and that the attorney had

said he did not want Neal to talk to anyone (Tr. 127). The trial judge said that, if Neal's attorney wished to permit Neal to be interrogated by the defense out of the presence of the jury, he would permit him to do so, but not otherwise (Tr. 127-128).

At trial, petitioners renewed their request to talk with Neal; the trial court again indicated that the decision of Neal's counsel would govern (Tr. 186-187). The United States Attorney left the courtroom and, upon his return, reported that Neal had said he would not talk to defense counsel without his counsel being present (Tr. 187). After Neal had testified, counsel for Smith stated that, when he went to the cell to talk with his client, Neal approached him and said he wanted to exonerate Smith (Tr. 378-379). Counsel for Tocco also reported that one of the three defendants had told him that Neal wanted to talk to him (Tr. 381). The court stated that the marshal had informed him that Neal wanted "to get away" from the defendants (Tr. 384). Neal was subsequently brought into court and a hearing was held out of the presence of the jury. Neal testified that he told Smith he would change his story because he would say anything to get away from the defendants (Tr. 453) but denied talking to Smith's attorney (Tr. 453-457). He said he asked the marshal to call the prosecuting attorney because he wanted to be moved to a different cell (Tr. 461). In the presence of the jury Neal testified that he told Smith that he would change his story (Tr. 482) but then affirmed the truth of his original testimony (Tr. 489).

The court of appeals ruled that it would have been better had the trial court permitted defense counsel to hear directly from Neal whether he wished to talk with them, but concluded that the error was harmless, especially in view of the extensive cross-examination of Neal (Pet. in No. 71-702, A12-A13). This ruling was correct. Neal was nineteen years old at the time of petitioner's trial. From his testimony it was obvious that he was frightened and did not want to talk to petitioners' attorneys; he had made clear in the message he had given government counsel that he would meet with them only if his own lawyer were present. A witness has the right to refuse to be interviewed or to dictate the circumstances under which he will submit to an interview. *Byrnes* v. *United States*, 327 F. 2d 825, 832 (C.A. 9), certiorari denied, 377 U.S. 970; *United States* v. *Dryden*, 423 F. 2d 1175, 1177-1178 (C.A. 5), certiorari denied, 398 U.S. 950.

2. On August 10, 1970, petitioners announced that they were ready for trial. On August 18, 1970, the next to the last day of trial, petitioner Tocco's attorney stated that on Saturday, August 15, he had interviewed Neal's grandmother and taken a statement from her, but was unable to serve her with a subpoena. He stated that he learned she had left for Mississippi the following evening (Sunday) and requested that the trial be delayed until she could be located and served. The court ruled that the trial would not be delayed but that if the witness appeared she would be allowed to testify (Tr. 1127-1130). At this time, Tocco's attorney advised the court (Tr. 1129) that, if it had not been for the policy of the

court not to issue subpoenas in blank, he would have had one available to serve on the witness when he interviewed her. It is contended that this policy was contrary to Rule 17 of the Federal Rules of Criminal Procedure. The rule, however, contemplates that a subpoena be obtained for a particular proceeding since it states that the subpoenas "shall state the name of the court and the title, if any, of the proceeding." As the court below held, there is no showing that petitioner asked for a subpoena with relation to this proceeding. Under these circumstances it was not an abuse of the trial court's discretion to deny petitioners' request for a continuance. *United States* v. *Bolton*, 438 F. 2d 1219, 1220 (C.A. 5).

3. After the trial, it was learned that one of the jurors was the sister-in-law of the aunt of petitioner Richmond. The juror testified that she was unaware that she was indirectly related by marriage to Richmond or that she had ever known him until after the trial was over and it was brought to her attention (Tr. 1300-1314). The matter is fully discussed in the opinion of the district court (Pet. in No. 71-702, A29-A32) and of the court of appeals (Pet. in No. 71-702, A19). There is nothing to indicate that petitioners were prejudiced by this undetected remote relationship.[3]

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[3] *Remmer* v. *United States*, 347 U.S. 227, is wholly inapposite. In that case a juror was approached by a third party who advised that a verdict favorable to the defendant could be profitable to him. This information was conveyed to the judge and government counsel, but not to the defense, and the F.B.I. conducted an investigation. It was concluded that the

4. On June 10, 1970, approximately three weeks after the robbery, a search warrant was issued to search petitioner Tocco's place of business. The affidavit for the warrant (set forth in the opinion below Pet. in No. 71-702, A4-A6 n. 1), after stating the facts as to the robbery, detailed facts related by an "admitted participant" in the robbery (essentially in accordance with Neal's trial testimony as outlined in the Statement). The affidavit alleged, *inter alia*, that the participant reported that on May 22, 1970, Tocco had in his possession at the premises to be searched, a black suitcase containing a portion of the money obtained in the bank robbery and said he would distribute part of the proceeds but keep the rest and make it available to the participants at a later time. The warrant specified the currency and checks taken in the robbery and certain other fruits and instrumentalities of the robbery as items being sought (Pet. in No. 71-702, A7-A8 n. 2). The warrant was executed the following day, and the charred remains of several items designated in the warrant were seized from a trash barrel located just outside the building (Tr. 65-68, 523-525).

Petitioners contend that the affidavit for the search warrant was insufficient because it was based on the uncorroborated statements of an accomplice. As the court below held (Pet. in No. 71-702, A4-A7), the

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statement was made in jest and the trial went on. Only after he had been convicted did the defendant learn of the matter by reading about it in the newspapers. In the instant case, the information only came to light after the trial and there had never been any attempt to influence the juror.

affidavit set forth what the accomplice reported in such precise detail that the magistrate could determine to credit his story and conclude that there was probable cause to believe the items sought were on the premises to be searched. See *Spinelli* v. *United States*, 393 U.S. 410, 416; *Aguilar* v. *Texas*, 378 U.S. 108, 114. In addition to the detail and specificity of the information, the informant was worthy of belief because his statement admitting that he was an accomplice who participated in the robbery was against his penal interest. See *United States* v. *Harris*, 403 U.S. 573, 583-584 (plurality of opinion of the Chief Justice).

It is further contended that the seizure of the trash barrel was unlawful in that its contents and location were not particularly described in the warrant. The search warrant enumerated the items being sought as including United States currency taken from the bank, together with United States currency, checks and other papers taken from the Brink's messenger during the robbery, plus a white canvas bag used to carry the stolen currency. The items seized which were admitted into evidence were the charred remains of a check taken from the Brink's guard (Government's Exhibit 9, Tr. 325-328), the ash from money straps (Government's Exhibit 11, Tr. 328-330), and the coin bag seals (Government's Exhibit 13, Tr. 340-343). They plainly fell within the reach of the warrant; the fact that they were charred did not alter their identity.

Petitioners lastly contend that the place from which these items were seized was not described in the search

warrant. As the court of appeals pointed out, however (Pet. in No. 71-702, A9), the trash barrel was located just outside the building housing Tocco's business establishment and, fairly considered, was located on the "premises" described in the warrant.

5. On July 31, 1970, during hearings on pre-trial motions, counsel for the government informed the defendant Richmond that his employer, who had testified before the grand jury, possibly had information which might be favorable to him (Tr. 116). Petitioner Tocco's counsel represented this individual at the time (Tr. 116). When counsel professed not to know the employer's name, the government told him it was David Leisure. (Tr. 181). Counsel thereafter renewed a request for the grand jury testimony, stating that Mr. Leisure would not talk with him (Tr. 181). The court stated it would look at the grand jury testimony, but suggested to counsel that he could subpoena the records of the employer on the day of the robbery and thus determine whether Richmond was listed as working at the time of the robbery (Tr. 183-184). The court later informed the defense that Richmond's employer had testified before the grand jury that Richmond got to work on May 22, 1970, between 7:55 and 8:05 A.M. (Tr. 387). The court also noted the witness had been represented at that time by the attorney for Tocco (Tr. 387). The request to see the grand jury minutes was not renewed.

Petitioner Richmond now argues that, if he had seen other portions of the employer's testimony, he could have decided whether to subpoena the witness. However, all that petitioner was entitled to under

Brady v. *Maryland*, 373 U.S. 83, was information possibly favorable to the defense. This he was given by the court. He was not entitled to examine all the grand jury proceedings to determine whether to call his employer as a witness.

6. About one week prior to trial, an F.B.I. agent showed Government witness Sabol (one of those present at the robbery) ten to fifteen photographs, including the photograph of petitioner Richmond (Tr. 361-362). At the time of the showing, Richmond was in custody and was represented by counsel. Relying on *United States* v. *Zeiler*, 427 F. 2d 1305 (C.A. 3), petitioner Richmond argues that his Fifth and Sixth Amendment rights were violated since his counsel was not present at the showing.

Zeiler has been either rejected by other circuits, or has been limited to its particular facts—*i.e.*, where the photographs were shown in a suggestive manner which had the potentiality of influencing a scheduled line-up. See *United States* v. *Williams*, 436 F. 2d 1166 (C.A. 9), certiorari denied, 402 U.S. 912; *McGee* v. *United States*, 402 F. 2d 434 (C.A. 10), certiorari denied, 394 U.S. 908; *United States* v. *Robinson*, 406 F. 2d 64 (C.A. 7), certiorari denied, 395 U.S. 926; *United States* v. *Bennett*, 409 F. 2d 888 (C.A. 2), certiorari denied *sub nom. Haywood* v. *United States*, 396 U.S. 852; and *United States* v. *Ballard*, 423 F. 2d 127 (C.A. 5). In this case, ten to fifteen photographs were used, and there is nothing to suggest that the procedure was suggestive. This Court has consistently refused to review the holdings that counsel need not be present at pretrial photo-

graphic identifications. There is no reason to take a different approach in the present case, particularly in view of the fact that there was ample other evidence of Richmond's participation in the robbery.

The further contention that the pretrial identification procedure violated due process (see *Simmons* v. *United States*, 390 U.S. 377, 383-384) is based on the assumption that Sabol, because of pretrial publicity, could have seen photographs of Richmond prior to the photographic identification. Sabol testified, however, that he had not seen any photographs of Richmond from the time of the robbery to the time of the pretrial identification (Tr. 361-362).

7. Petitioner Long alleges that he was arrested without probable cause and that, therefore, certain items which were seized at the time of his arrest and admitted into evidence should have been suppressed. The opinion below sets forth the facts and legal principles relevant to this contention and properly concludes that there was probable cause for Long's arrest and incidental search (Pet. in No. 71-702, A26-A23).